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HOME INSURANCE COMPANY, Plaintiff, vs. CORNELL-DUBILIER ELECTRONICS, INC., et al, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY Civil Action Docket No. MER-L-5192-96
CORNELL-DUBILIER ELECTRONICS, INC., et al. Plaintiff, vs. UNITED INSURANCE COMPANY, Defendant.	Civil Action Docket No. MER-L-2773-02
CORNELL-DUBILIER ELECTRONICS, INC., et al. Plaintiff, vs. COLUMBIA CASUALTY COMPANY, et al., Defendants.	Civil Action Docket No. MER-L-463-05

INTERVENOR EXXON MOBIL CORPORATION'S MEMORANDUM OF LAW IN OPPOSITION TO CORNELL-DUBILIER ELECTRONICS, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST THE LONDON MARKET INSURERS WITH RESPECT TO THE EXXON POLICIES

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PRELIMINARY STATEMENT

Exxon Mobil Corporation ("Exxon") respectfully submits this memorandum of law in opposition to Cornell-Dubilier Electronics, Inc.'s ("CDE") motion for summary judgment with respect to the Exxon Policies (as defined below). Exxon is contemporaneously moving to intervene in this action as a real party in interest concerning the policies. Exxon also is moving to stay any claim on the Exxon Policies pending arbitration, pursuant to the arbitration clause in each of the policies. Accordingly, Exxon seeks an order (a) permitting its intervention, (b) staying all claims for coverage under the Exxon Policies pending arbitration, and (c) in the event this Court denies the motion to stay, denying CDE's motion for summary judgment on the issue of coverage under the Exxon Policies. This memorandum addresses the requested denial of the CDE summary judgment motion and is only relevant in the event this Court denies the motion to stay the claims pending arbitration.

A review of CDE's crossclaims in this matter shows CDE has failed to allege facts sufficient to set forth any cause of action against the London Market Insurers or Exxon with respect to the Exxon Policies. This includes, without limitation, failing to identify the policies for which the London Market Insurers and, ultimately, Exxon are claimed to be liable, and failing to identify the specific insurers subscribing to those Exxon Policies. In its 2002 Second Amended Answer and Crossclaims with respect to the "Certain Underwriters at Lloyds" named in the 1997 Home Insurance Amended Complaint, CDE's allegations are directed at coverage that had been placed by Federal Pacific Electric Company ("FPE"), its parent, on its and CDE's behalf in 1959 and again in 1979 to 1980 (the "FPE/CDE London Insurance"). That insurance was placed with Certain syndicates at Lloyd's, as well as with Certain insurance companies operating in London, but not as part of Lloyd's. In answering the CDE Crossclaims, counsel for these insurers in 2002, carefully noted the 11 policies and the specific insurers they represented.

CDE has never complained that this denomination was too narrow. There is no reference of any type in the 2002 Crossclaims or in the 2002 London Market Insurers' Answer to CDE's Second Amended Crossclaims of the Exxon Polices, or of the more than 230 insurers who subscribed to the Exxon Policies in the period 1979 to 1983. As such, CDE's motion for summary judgment on the Exxon Policies should be denied because CDE's 2002 Crossclaims do not seek the affirmative relief this summary judgment motion attempts to obtain for CDE. Rule 4:46-1 only permits a motion for summary judgment on affirmative relief stated in a party's pleading.

In the event this Court finds CDE has asserted a claim for coverage under the Exxon Policies in its crossclaims in this matter, and that any such claim should not be stayed for arbitration, the instant motion for summary judgment must be denied because genuine issues of material fact exist, discovery is necessary to determine if additional material fact issues exist, and CDE is not entitled to an order finding coverage under the Exxon Policies as a matter of law.

STATEMENT OF FACTS

This action was first commenced in 1996 as a declaratory judgment action by Home Insurance Company ("Home"). *See* Maniatis Cert., ¶ 2. Home served a First Amended Complaint in 1997. *See id.*, Exh. 1. In 2002, CDE filed a Second Amended Answer to this Amended Complaint, with Crossclaims. *See id.*, ¶ 3, Exh. 2. Some of the defendants denominated as "Certain Underwriters at Lloyds" filed an Answer to the CDE Second Amended Crossclaims in 2002, and referred to themselves as London Market Insurers because the answer was filed on behalf of Certain syndicates at Lloyd's, as well as Certain insurance companies that had subscribed to 11 identified insurance policies, namely, the FPE/CDE London Insurance. *See id.*, ¶¶ 8-11, Exhs. 18-19. The CDE Crossclaims, the London Market Insurers, and, indeed, the litigation with respect to these London Market Insurers focused on the FPE/CDE London Insurance. *See id.*, ¶ 12. Thus, the 2004 trial before Judge Sabatino, referenced at page 5 of the

CDE Moving Memorandum of Law ("CDE Memo"), as well as the 2007 summary judgment motion referenced at pages 5 to 7 of the CDE Memo, dealt only with the 11 policies that comprised the FPE/CDE London Insurance. *See id.*, Exh. 20 Neither the trial nor the motion dealt at all with the Exxon Policies. *See id.*

Discovery commenced in 2008 on the Exxon Policies. *See* Maniatis Cert., ¶ 13. Following completion of that discovery, CDE filed this motion for summary judgment against the London Market Insurers[1] for environmental coverage under the Exxon Policies, without amending the Crossclaims to assert claims against the insurers on those policies. *See id.*, ¶ 14. Importantly, not all of the London Market Insurers subscribed to the Exxon Policies. *See* Heckman Cert., ¶ 3. Of the 15 insurance companies identified in the 2002 Answer to the CDE Second Amended Crossclaims, only six insurers also subscribed to one or more of the Exxon Policies at some point in time. *See id.* Of the 112 Lloyd's syndicates identified in the 2002 Answer to CDE's Second Amended Crossclaims, only 44 also participated at some time on one or more of the Exxon Policies. *See id.* As a result, more than 180 insurers on the Exxon Policies are not parties to this action. *Id.*

The Exxon Policies provided liability coverage directly to Exxon and/or reinsurance to Ancon effective January 1, 1979 to January 1, 1980, with renewals each year until, as relevant here, November 1, 1985 (collectively, the "Exxon Policies"). *See* Chasser Cert., ¶ 6. CDE now

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[1] The London Market Insurers specifically consist of CNA Reinsurance Co., Ltd.; Compagnie d'Assurances Maritimes Aeriennes et Terrestres (CAMAT) per C.U.A.L. Underwriting Agency; Compagnie Europeene dAssurances Industrielles S.A.; Dominion Insurance Co., Ltd.; Excess Insurance Co., Ltd.; Imperio Companhia de Seguros, Lisbon; Royale Belge Per Thilly Reinsurance Service, Belgium; St. Katherine Insurance Co., Ltd.; Stronghold Insurance Co., Ltd.; Union Atlantique S.A.; Unionamerica Insurance Co., Ltd.; Willis Faber (Underwriting Management), Ltd.; Winterthur Swiss Insurance Co., Ltd.; Wurttembergische Feuer Per Coggia; Yasuda Fire & Marine Insurance Co. (UK), Ltd.; and several Lloyds syndicates who subscribed to FPE/CDE London Insurance with Policy Nos. CK4294, CK4295, K56745, K56746, K56747, NC5606, NC5607, NC5608, NC7760, NC7761, and NC7762. The London Market Insurers specifically identified these insurers and policies in the preamble to their Second Amended Answer to CDE's Second Amended Crossclaims. *See* Maniatis Cert., ¶ 8, Exh. 18. Of these insurers, only six of the company insurers and 44 of the Lloyd's syndicates also are coincidentally on the Exxon Policies. *See* Heckman Cert., ¶ 3.

claims for the first time in this motion for summary judgment that it is entitled to coverage under those Exxon Policies as a former subsidiary of Exxon.

CDE's Crossclaims Only Seek Relief on the FPE/CDE London Insurance With Respect to the London Market Insurers

CDE's crossclaims identify the Crossclaim Defendants in paragraphs 3 and 6 of the Crossclaims. *See* Maniatis Cert., ¶ 4, Exh. 2, ¶¶ 3, 6. Paragraph 3 of the Crossclaims merely states that "Defendants-in-crossclaim are the Insurer Defendants." *See id.*, Exh. 2, ¶ 3. "Insurer Defendants" is a reference to this term in paragraph 35 of the Home Insurance First Amended Complaint, which identifies the Insurer Defendants as those defendants included in Certain paragraphs of the Amended Complaint. *Id.*, ¶ 4, Exh. 1, ¶ 35. Paragraph 23 of the Amended Complaint provides "Certain Underwriters at Lloyds of London . . . issued . . . one or more policies of insurance to CDE and/or FPE." *Id.* at ¶ 23.

As explained in the Certification of Thomas Chasser, Lloyd's of London was an insurance market in London that provided a place of business for syndicates of underwriters who registered at Lloyd's on an annual basis. *See* Chasser Cert., ¶ 4. Each syndicate was identified by a separate number and would, in turn, be managed by a Managing Agent. *See id.* The syndicates were not insurance companies in the sense of separately incorporated companies. *See id.* Rather, each of the underwriters at the time were individuals who at least, theoretically, had personal liability for the insurances underwritten by the syndicate. *See id.* Separate and apart from Lloyd's, the London insurance market in the 1970's and early 1980's, also had a large number of insurance companies that wrote insurance from offices in London. *See id.*, ¶ 5. These insurance companies were not underwriters at Lloyd's and conducted their insurance business independently of Lloyd's. *See id.*

At paragraph 4 of its Crossclaims, CDE vaguely alleges "Crossclaim Insurers entered into a series of insurance policies providing primary and/or excess comprehensive general liability insurance to CDE." Maniatis Cert., Exh. 2, ¶ 4. CDE makes clear at paragraph 6, however, the insurers amongst the "Certain Underwriters at Lloyds" who actually are the subject of the Crossclaims. *See id.*, ¶ 4, Exh. 2, ¶ 6. Thus, CDE claims "it gave the Crossclaim Insurers notice of the claim by the State of New Jersey with respect to the South Plainfield Site and the residential Suits." *See id.*, ¶ 5. The supposed notices CDE gave to Certain Underwriters at Lloyd's are annexed to the Maniatis Certification as Exhibits 3-6.

These notices reference six specific policies in 1979 and 1980 and "[Various Placements] Effective 05/29/59-07/01/62." Maniatis Cert., ¶ 6, Exhs. 3-6. The 1959 to 1962 placements consisted of five additional policies issued to FPE. *See id.*, ¶ 7. None of the policies are the Exxon Policies referenced in the instant CDE motion for summary judgment. *See id.* As Mr. Maniatis attests, the answer submitted by Certain Underwriters at Lloyds, as well as 15 specified insurance companies, used the identification in the notice letters referenced in the Crossclaims to determine the policies and insurers subject to the claims and identified by the general label, "Certain Underwriters at Lloyds." *See id.*, ¶¶ 8-9. As Mr. Maniatis further notes, the 15 insurance companies listed in the answer voluntarily appeared because they were not underwriters at Lloyds and, therefore, could not be part of the general denomination "Certain Underwriters at Lloyds." *See id.*, ¶ 10. The Answer carefully identifies the 11 policies and syndicates and 15 then-solvent insurance companies that also subscribed to the policies. *See id.*, ¶ 11. Mr. Maniatis attests that CDE never contested the identification of the policies, the Lloyd's underwriters, or the insurance companies contained in the answer filed by these insurers. *See id.* Indeed, as noted above, the policies identified in the London Market Insurers' answer to CDE's

crossclaims are the same policies identified in the notice letters referenced in paragraph 6 of the Crossclaims. *See id.*, Exhs. 2-6.

As a result, nothing in CDE's crossclaims identifies the Exxon Policies or the more than 230 insurance companies and Lloyd's syndicates that subscribed to the Exxon Policies. *See* Maniatis Cert., Exhs. 2-6. There also is simply no claim for affirmative relief in the Crossclaims with respect to the Exxon Policies. *See id.*, Exh. 2.

Since 1996, this lawsuit has proceeded on the basis that the London Market Insurers' involvement stemmed from the FPE/CDE London Insurance identified by CDE in its notice letters. *See* Maniatis Cert., ¶ 12. Indeed, after the Exxon Policies became a subject of discovery and motion practice, the London Market Insurers' counsel, George Maniatis, specifically asked CDE's counsel, Robert Sanoff, if claims were being made under the Exxon Policies. *See id.*, ¶ 13. In a July 27, 2009 email, Mr. Maniatis asked Mr. Sanoff:

> Third, please state CDE's position regarding whether it is claiming directly under the 1980-1983 London Exxon policies. Will CDE be amending its Complaint to add the 1980-1983 Exxon policies? If not, much of the discovery CDE is seeking seems irrelevant to the issue of whether the Ancon policy limits should be included in the New Jersey Carter-Wallace allocation.

Maniatis Cert., ¶ 13, Exh. 21. In response, Mr. Sanoff stated:

> It is CDE's position that it is covered under the Exxon Policies that Lloyds has produced. When CDE completes discovery as permitted by the Court's recent order, CDE will make an appropriate motion to assert its right to the additional coverage in the NJ case.

Id. Mr. Sanoff's reply notes CDE would move to assert a claim for affirmative relief in the "NJ case" for the additional coverage. *See id.* Rather than follow the proper procedural route of seeking to amend the Crossclaims, CDE chose to file a premature motion for summary judgment.

Acquisition of CDE and Ancon Policy No. 7/147

In March 1979, Reliance Electric Company ("REC") acquired FPE from UV Industries, at which time FPE wholly-owned CDE. *See* Stolle Cert., ¶ 3. After that acquisition, Reliance managed the insurance decisions for those entities until they were sold, transitioning their coverage to the Reliance insurance program. *See id.*, ¶¶ 3-4. The Reliance insurance policies renewed on July 1, 1979, and provided coverage through June 30, 1980. *See id.*, ¶ 4.

In mid-1979, Exxon announced a tender offer for the sale of Reliance stock. *See* Stolle Cert., ¶ 5. Given its large size, this transaction raised antitrust concerns and Exxon had difficulty acquiring Reliance. *See id.* As such, Reliance maintained its own independent insurance coverage, which covered CDE. *See id.* Exxon eventually acquired Reliance at the end of 1979. *See id.*, ¶ 6. In late 1979, Ancon Insurance Company, Inc. (Exxon's wholly-owned captive insurer ("Ancon") offered to provide coverage to Reliance (and its affiliates) effective January 1, 1980. *See id.*, ¶ 7. The existing Reliance insurance polices did not expire, however, until June 30, 1980. *See id.* Reliance specifically considered and rejected the Ancon coverage, deciding to wait until July 1, 1980, when Reliance's existing pre-acquisition coverage expired. *See id.*; Chasser Cert., 11.

From July 1, 1980 until its sale, Reliance purchased insurance coverage from Ancon for itself and its subsidiary companies, including CDE, under Policy No. 7/147. *See* Chasser Cert., ¶ 12; Stolle Cert., ¶ 9, Exh. A. Each year that Reliance (and CDE) remained affiliated with Exxon, Reliance renewed the Ancon policy, paid a premium, and charged its subsidiaries, including CDE until its sale in 1983, their proportionate share. *See* Stolle Cert., ¶ 10; Chasser Cert., ¶ 12.

The Exxon Policies

Exxon and Ancon purchased insurance and reinsurance in programs subscribed by both Lloyd's syndicates and insurance companies from around the world. *See* Chasser Cert., ¶ 3. Certain of the policies resulting from this program have been referred to on this motion as the Exxon Policies. That program extended for a number of years. *See id.* The relevant years for this action are 1979 through 1984 because (a) CDE claims coverage on its motion for the years 1979 through the date in 1983, when it was no longer an indirect Exxon subsidiary, and (b) certain endorsements added to the program in 1984 eliminated coverage for claims such as the ones presented here by CDE.

CDE claims that as a subsidiary of Reliance, it is entitled to coverage under the Exxon Policies as either the result of the Named Insured clause or certain addendums added to the policy that reference Reliance. From 1979 through 1983, CDE did not handle its own insurance. *See* Stolle Cert., ¶¶ 3-4. Rather, Reliance procured and managed CDE's insurance. *See id.* Reliance never negotiated for coverage under the Exxon Policies or considered those policies to be direct insurance for Reliance or its affiliates. *See id.*, ¶ 11. Nor did Reliance (or CDE) pay premiums for or review those policies. *See id.* Rather, starting in mid-1980, Reliance procured for itself and its subsidiaries a policy of insurance from Ancon and considered this policy to be its own and its subsidiaries' insurance. *See id.*, ¶¶ 9-11.

This understanding was evident in the annual registers Reliance produced to list and describe all coverage in effect for its affiliates and itself at that time, as none of the registers during the 1979 to 1983 period included any of the Exxon Policies. *See* Stolle Cert., ¶ 12, Exh. B. Rather, after July 1, 1980, the registers only listed Ancon policies issued to Reliance. *See id.*

In late 1986, when Reliance sold its stock, the parties to that agreement listed the Ancon policy on the annexed insurance coverage schedule. *See id.*, ¶ 13, Exh. C. The schedule made no reference to any of the Exxon Policies because Reliance never considered those policies to provide insurance to Reliance or its subsidiaries. *See id.*, ¶ 13.

As noted by Peter Wilson, a lead underwriter on the Exxon Policies, the Exxon/Ancon Insurance program was unusual in that it combined both direct insurance and reinsurance in a single program. *See* Wilson Cert., ¶ 4. Accordingly, each of the Exxon Policies identifies and defines the "Named Insured" as follows:

> (1) EXXON CORPORATION and its Affiliated Companies as they are now or may be hereafter constituted and/or
>
> (2) ANCON INSURANCE COMPANY, S.A. as insurers, either directly or indirectly by means of reinsurance, of Exxon Corporation and its Affiliated Companies as they are now or may be hereafter constituted.

Wilson Cert., Exh. A. The "Named Insured" was defined in this way to give Exxon and Ancon, as the named insureds, maximum flexibility with respect to the use of the program as direct insurance or reinsurance as might be most appropriate for Exxon or one of its affiliates. *See* Wilson Cert., ¶ 4; Chasser Cert., ¶¶ 7-8. Where Ancon issued a policy to Exxon or one of its affiliates, the Exxon/Ancon program acted only as reinsurance of Ancon. *See id.* As attested to by both Peter S. Wilson and Thomas Chasser, a former Vice President of Exxon Mobil Risk Management, Inc. (also formerly known as Exxon Insurance Services Corp.), who managed the Exxon/Ancon Insurance Programs:

> [I]f Exxon decided that some of its or its Affiliates' risks would be covered by an Ancon policy and some by direct insurance under this program, the operative word would be "and" in the "and/or" phrase because the program would be providing both reinsurance to Ancon and insurance to Exxon or its affiliates that did not have an Ancon policy. On the other hand, if Exxon were to decide to

> have no insurance through Ancon or to have all of its activities insured directly through Ancon, the operative word in the "and/or" phrase would be "or" because the program would be providing either all direct insurance or all reinsurance.

Wilson Cert., ¶ 5; Chasser Cert., ¶ 8.

Neither the insurers, Exxon, nor Ancon ever intended the Exxon/Ancon program to effect double insurance for any affiliate or for Exxon itself. *See* Wilson Cert., ¶ 6; Chasser Cert., ¶ 9; Stolle Cert., ¶¶ 11-13, Exhs. B-C. Duplicative cover was never contemplated or granted unless cover was in excess of the policy limits granted by the other insurer. *See* Wilson Cert., ¶ 6. To do otherwise would be "economically nonsensical because it will result in much higher costs for the insured, as well as conflicts when a claim needs to be settled." *Id.* In addition, Exxon recognized that if the Exxon/Ancon Program were to provide both direct insurance to a particular subsidiary and reinsurance of Ancon insurance of that same subsidiary, it would be required to pay premiums far in excess of the premiums being charged for the program as contemplated by both the insurers and Exxon. *See* Chasser Cert., ¶ 10.

Given Reliance's size, Exxon or Ancon had to disclose Reliance's operations to the London Market insurers before Reliance could receive coverage through the Exxon/Ancon insurance program either directly or as a part of Ancon's reinsurance. *See* Wilson Cert., ¶ 7, Exh. B. That disclosure was made on December 18, 1979, just before the inception of the 1980 policy year. *See* Wilson Cert., ¶ 7, Exh. B. Because a decision had been made by Exxon in consultation with Reliance that the Reliance pre-existing insurance would be allowed to expire, the cover for Reliance as an insured of Ancon only incepted on July 1, 1980. *See* Stolle Cert., ¶ 7; Chasser Cert., ¶ 11. In turn, these Reliance risks would flow through to the Exxon/Ancon insurance program as reinsurance of Ancon as of the same date, here, July 1, 1980. *See* Chasser Cert., ¶ 13; Wilson Cert., ¶ 8. That reinsurance resulted in an additional premium related to the

Reliance risks per annum to be paid on a pro rata basis in 1980, for the time of actual coverage. *See id.* This agreement between Exxon and Ancon and the insurers is reflected in Addendum No. 20 to the 1980 Exxon Policy. *See* Wilson Cert., ¶ 8, Exh. A, Add. No. 20; Chasser Cert., ¶ 7. In addition, the broker's file that was produced in this case also includes a signed note that sets out this understanding by stating, "It is noted and agreed that RELIANCE ELECTRIC COMPANY is not included effective inception but will be included effective from [1st July 1980]." Toriello Cert., Exh. 7.

Addendum No. 20 and other addenda to the 1980 to 1983 policies refer to Reliance as an additional insured. *See* Wilson Cert., ¶ 9, Exh. A, Add. No. 20; Chasser Cert., ¶ 14. As explained by Peter Wilson and Thomas Chasser, the unusual nature of the Exxon/Ancon insurance program meant the parties understood that reference to Reliance as an additional insured, or any other Exxon affiliate identified on additional insured addenda, did not necessarily extend direct insurance on the Exxon Policies to these affiliates. *See* Wilson Cert., ¶ 9; Chasser Cert., ¶ 14. Rather, in a normal reinsurance program, the ceding insurer would be required to identify its insureds and the types of risks that might be covered under the reinsurance program. *See* Wilson Cert., ¶ 9. Given the flexibility provided by the London Market Insurers to Exxon with respect to the use of the program as direct insurance or reinsurance, the broker, on behalf of Exxon and the insurers, documented an affiliate's disclosure and its inclusion in the insurance and reinsurance program by simply issuing addenda identifying the affiliate as an additional insured. *See id.*; Chasser Cert., ¶ 14. The actual status of these insureds under the Exxon/Ancon program, however, depended upon whether Ancon had in fact issued a policy of direct insurance. *See id.*

Even if, contrary to the parties understanding and intention, this court were to find that Reliance was somehow receiving direct insurance, the addenda that were issued for 1980 and 1981 did not include any Reliance affiliates. *See* Sanoff Cert., Exh. G12-29, Add. No. 20. Consequently, CDE would not have coverage even under CDE's theory in either of these years.

Elimination of Coverage for Environmental Liabilities Under the Exxon Policies

Addendum No. 28 to the Exxon Policies, added in 1984, eliminated coverage for the environmental liabilities CDE now seeks to have covered on this motion. *See* Chasser Cert., ¶¶ 15-16, Exh. 1, Add. No. 28. CDE has previously moved for summary judgment to obtain an order that the Ancon policy does not provide coverage to CDE for the environmental liabilities involved on this motion based on an Endorsement No. 19 that had been added to the Ancon policy. *See* Toriello Cert., Exh. 8. Endorsement No. 19 was copied from the Exxon Policies' Addendum No. 28. *See* Chasser Cert., ¶ 16, Exh. 1; *see also* Stolle Cert., Exh. A, End. No. 19. CDE made the motion on Endorsement No. 19 to eliminate the Ancon policies – on which it has made no claim – from consideration in the *Carter-Wallace* allocation for the remaining insurers in this matter. *See* Toriello Cert., Exh. 8. Judge Jacobson ultimately denied that motion on the basis that genuine issues of fact existed. *See* Toriello Cert., Exh. 9 at 77:20-89:17. Here, CDE's prior arguments under the same provision in the Ancon policies demonstrate that CDE is not entitled to judgment as a matter of law and that, at a minimum, there are questions of fact.

Consistent with the trends in the insurance and reinsurance markets at the time, the insurers added Addendum No. 28 to the Exxon Policies in 1984 to change the coverage from occurrence-based to claims-made:

> Notwithstanding anything to the contrary contained herein, this policy shall not apply to any claim made against the Assured for damages on account of personal injury, property damage and/or

advertising injury where as at, or prior, the inception date of this policy

* * *

c) the occurrence, already known to the Assured as defined in this policy, has already happened.

Chasser Cert., ¶¶ 15-16, Exh. 1, Add. No. 28.

The addition of Addendum No. 28 to the Ancon reinsurance resulted in Ancon issuing its own, virtually identical endorsement for the Ancon policy, namely, Endorsement No. 19. *See* Chasser Cert., ¶ 16; Toriello Cert., Exh. 10 at 84:11-15) (Mr. Chasser, a former Vice President at Exxon Mobil Risk Management, Inc. who managed Exxon/Ancon Insurance Programs, explaining that he drafted the Ancon Endorsement No. 19 "to pass the language of our reinsurance covers on to our affiliate, be that good or bad, and this was the continued deterioration of the insurance market that I mentioned earlier"). The Ancon Endorsement No. 19 provides in pertinent part:

Notwithstanding anything to the contrary contained herein, this policy shall not apply to any claim made against the Assured for damages on account of personal injury, property damage and/or advertising injury where as at, or prior to, the inception date of this policy

* * *

c) The occurrence as defined in the policy has already happened.

Stolle Cert., Exh. A, End. No. 19.

As noted above, CDE argued on a motion for summary judgment to exclude the Ancon policies from the *Carter-Wallace* allocation that Endorsement No. 19 changed the policy from an occurrence-type program to a claims-made program, and retroactively applied to the July 1, 1980 inception date of the Ancon Policy. *See* Toriello Cert., Exh. 8 at 6-7 ("*Carter-Wallace* Summary Judgment Motion"). Indeed, CDE quoted from Mr. Chasser's deposition to note the imposition

by Ancon of the same terms imposed in the Exxon/Ancon insurance program. *See id.* at 4 n.4.[2] With respect to Endorsement No. 19, which simply passed on the language of Addendum No. 28 of the Exxon Policy, CDE admitted "[t]hat coverage was functionally commuted; not only do the environmental claims at issue in this action all involve occurrences which arose prior to 1980, but no claims were in fact asserted during the Ancon Policy period." *Id.* at 6. As such, "CDE . . . ha[s] not asserted any claims in this litigation against Ancon because a review of the Ancon Policy and the clarification obtained by Mr. Stolle as to the impact of Endorsement No. 19 demonstrate that there is no coverage under the Ancon Policy for environmental claims." *Id.*

The same is true of the Exxon Policies: Addendum No. 28 "functionally commuted" coverage from inception by changing the policies from occurrence-based to claims-made coverage. *See* Chasser Cert., ¶¶ 15-16. Given CDE's admission before this Court that "the environmental claims at issue in this action all involve occurrences which arose prior to 1980, but no claims were in fact asserted during the Ancon Policy period" (Toriello Cert., Exh. 8 at 6), the retroactive commutation of Addendum No. 28 precludes coverage for any environmental claim CDE now seeks to have covered under the Exxon Policies on this premature and ill-founded motion for summary judgment.

In addition to Addendum No. 28, the insurers on the Exxon Policies, Exxon, and Ancon clearly agreed to commute the environmental liabilities under those and other Exxon policies in the Settlement Agreement and Release dated June 30, 2000. *See* Heckman Cert., ¶¶ 5, 6(b) at § 3.1. ("Settlement Agreement"). Section 1.1 of this Settlement Agreement defined EXXON as including, among others, Ancon and each of Exxon's subsidiaries and affiliates. *See id.*, ¶ 6(a) at

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[2] This argument, based upon the 1984 Exxon Policy, suggests that CDE in fact knew of the Exxon Policies and their terms as early as August 22, 2006, the date of the Chasser deposition it references in its *Carter Wallace* Summary Judgment Motion and chose not to assert or investigate possible claims on the Exxon Policies.

§ 1.1. Section 3 of this Settlement Agreement released the insurers on the Exxon Policies from all claims:[3]

> whether presently known or unknown, asserted or unasserted . . . that EXXON ever had, now has or hereafter may have: (i) for insurance coverage . . . in connection with ENVIRONMENTAL LIABILITY; and (ii) arising out of or related to any act, omission, representation or conduct of any sort in connection with the POLICIES...

Id., ¶ 6(b) at § 3.1. Even if CDE is an additional insured under the Exxon Policies, which was not the case as attested to by the insurers and Exxon, this release precludes CDE's claims under those policies, where CDE had not paid for or relied upon the cover. CDE's status as an unknowing third-party beneficiary does not, under these circumstances, preclude the contracting parties from changing the contract. Indeed, CDE recognized on its *Carter-Wallace* Summary Judgment Motion that coverage changes agreed to by its parent Reliance are binding on CDE as an additional insured. *See* Toriello Cert., Exh. 9 at 21:25-23:15.

The Known Loss Doctrine Precludes a Finding that CDE is Entitled to Coverage As a Matter of Law

As noted above, Reliance acquired insurance for itself and its subsidiaries, including CDE, from Ancon as of July 1, 1980. *See* Stolle Cert., ¶ 9; Chasser Cert., ¶ 12. In a Memorandum CDE and FPE jointly submitted to this Court in opposition to Allstate's motion to join Ancon as a third-party defendant in this action, CDE asserted that

> the Ancon policies cover periods of time when environmental risks from PCB releases were beginning to be understood sufficiently to raise the likelihood that those risks were not covered because of the "known loss" doctrine.

Toriello Cert., Exh. 11 at 10. At page 11 of that same Memorandum, CDE again made the point: "The Ancon policies do not appear to provide coverage for the environmental claims because of

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[3] This release does not apply to those insurers listed on Attachment C to the Settlement Agreement (none of which are London Market Insurers appearing in this action).

the known loss doctrine." *Id.* at 11. At a minimum, these admissions by CDE regarding the Ancon policies, which cover the same time as the Exxon Policies, create a genuine issue of material fact as to coverage under the Exxon Policies. Such a genuine issue also is borne out by the evidence so far identified with respect to CDE and its operations and the expected losses from 1979 or 1980 through 1983.

Soon after Exxon acquired Reliance, the parties discovered significant problems with the operations of FPE and CDE not previously disclosed by its former parent, UV Industries. *See* Stolle Cert., ¶ 8. For instance, CDE was accused of causing widespread pollution, particularly from PCBs, in connection with its manufacturing operations. *See id.* As such, by July 1, 1980, when Reliance purchased the Ancon policy, Reliance knew about claims concerning PCB contamination associated with CDE's manufacturing operations. *See id.*, ¶ 9.

Of course, CDE knew about its PCB problems long before Reliance discovered them. CDE had used PCBs in its operations since 1941. *See* Toriello Cert., Exh. 14; Bates Cert., Exh. 3. And, its operations at South Plainfield, Newark, and New Bedford, Massachusetts were essentially the same in the early days, when the risks were not known or appreciated. *See* Toriello Cert., Exh. 13; Bates Cert., Exhs. 2-5. By the early 1970s, however, CDE's sole supplier of dielectric fluids containing PCBs, Monsanto, visited CDE and advised it of the environmental risks that PCBs posed. *See* Toriello Cert., Exhs. 13-18. Through the 1970s, the EPA and state regulatory authorities also became increasingly aware of the hazards posed by PCBs and a number of regulations and restrictions were imposed. *See id.*, Exhs. 13-14, 19-20. During this time, CDE took steps to improve its operations and reduce PCB contamination, but it was still subject to increasing oversight and scrutiny and apparently did nothing to address the problems it had created at its former facilities. *See id.* By 1979, CDE had become aware that its

operations had caused widespread contamination, and that it faced significant potential liabilities. *See id.*, Exhs. 21-22. In 1979, the Massachusetts Department of Public Health closed approximately 18,000 acres of New Bedford Harbor and upper Buzzards Bay to fishing and lobstering because of widespread PCB contamination from CDE and another electrical capacitor manufacturing facility (Aerovox). *See id.*, Exh. 21.

By the 1980s, there was no doubt about the risks and liabilities posed by PCB contamination. In 1980, CERCLA was enacted, and the New Bedford Harbor was listed as a Superfund Site in July 1982. *See* Toriello Cert., Exh. 21. Meanwhile, CDE had been served with lawsuits in 1980 and 1981 by fishermen and lobstermen who alleged that their livelihood had been impacted by closure of the harbor and bays to fishing. *See* Exxon SOF, ¶¶ 107, 111. Also in 1980, Reliance, CDE's parent, which managed its insurance decisions, filed suit against the former shareholder for securities fraud because it failed to disclose known environmental liabilities. *See* Bates Cert., Exh. 6. The Ancon policy secured by Reliance for itself and its affiliates, including CDE, expressly excluded coverage for PCB contamination at New Bedford Harbor. *See* Stolle Cert., Exh. A, End. No. 4. In 1980, a survey of the CDE plant revealed extensive issues, and CDE was expressly alerted that it had potential liability. *See* Toriello Cert., Exh. 22.

Indeed, by June 22, 1983, when FPE sold CDE's stock pursuant to a purchase agreement, CDE expressly recognized known issues concerning PCB contamination. *See* Heckman Cert., ¶ 4, Exh. 1. FPE identified those as "Exhibit 'A' Matters," which were defined as follows:

> The Company [CDE] has for many years utilized, sold and disposed of chemicals and products containing chemicals with attributes or properties considered to be hazardous or toxic, including di-electrics such as – polychlorinated biphenyls, phthalate esters, and various other solvent chemicals and heavy metals, such as trichlorethane. Because of the potential for hazard

> which such substances pose, a number of legal theories (based on statutes and common law) may be asserted against the Company as a result of such utilization, sale or disposal of such products or chemicals. A number of the chemicals utilized by the Company are very persistent in the environment and the exact nature of threat that they pose to humans and the environment may not be understood at this time; however, it is recognized that the presence of these chemicals may continue to exist *at all facilities and properties where the Company has operated* (both manufacturing and warehousing) or to which waste may have been sent or released. *In light of prolonged utilization and the wide variety and distribution of such chemicals many parties (governmental and otherwise) may have claims or assert claims against the Company.*

Id., Exh. 1 (emphasis added). During the period 1979 through June 1983, CDE plainly became aware of the losses certain to occur as a result of its past use of PCB's "at all facilities . . . where the Company ha[d] operated." *Id.* Discovery is clearly necessary to identify what was known by CDE and at what time before any determination of coverage can be made for this period of the supposedly overlapping coverage under the Ancon policies and the Exxon Policies. At a minimum, this and other evidence demonstrate a genuine issue of material fact related to known loss.

CDE's Covenant Not to Sue and Agreement to Indemnify Exxon

CDE's pursuit of this claim against the Exxon Policies is a violation of the Stock Purchase Agreement dated June 22, 1983. Section 3.3(a) of that agreement provides as follows:

> Covenant Not to Sue. Buyer and the Company jointly and severally covenant that no one of them directly or *indirectly* will bring any claim or demand or institute any action or suit at law or in equity against Seller, and/or its *affiliates* . . . or institute or knowingly aid in institution of any claim, demand, action, suit, investigation, prosecution or proceeding against Seller, and or its affiliates . . . arising out of, based upon, or *in any way relating to the Company's business including, but not limited to, the Exhibit "A" Matters* [among other things, liabilities for PCBs and other contamination].

Heckman Cert., Exh. 1, § 3.3(a) (emphasis added). By definition in the Stock Purchase Agreement, Exxon is a an affiliate of the Seller, FPE. *See id.* In light of the indemnity that is a part of the Settlement Agreement (*see id.*, ¶ 6(a) at § 4.1(d),[4] this purported claim against the London Market Insurers constitutes either a direct or indirect claim against Exxon that is barred by this covenant not to sue.

In addition to covenanting not to bring an action against Exxon, such as the claim presented on this summary judgment motion, the Stock Purchase Agreement provides for indemnity to protect Exxon if any such claim is made:

> The Company [CDE] hereby agrees that from and after the Closing, the Company will indemnify the Seller, and/or its affiliates . . . and hold them harmless from any and all loss, damage, liability, penalty, reasonable attorneys' and accounting fees, or deficiency resulting or arising out of any claims, demands, suits, investigations, prosecutions or proceedings based upon or in any way related to Exhibit "A." Matters or other actions relating to the operation of the Company, by whomsoever brought, made or instituted; provided . . . that the Indemnitees named in this section shall not be entitled to be indemnified against the consequences of their own acts or omissions or acts or omissions of any one or more of them unless such acts omissions were known, agreed to or participated in by the Company, its directors, officers or employees. For the purposes of this Paragraph, the parties agree that an omission by Company prior to Closing shall not of itself be [sic] considered to be an omission by the Seller.

Heckman Cert., Exh. 1 , § 5.5.

At a minimum, this Covenant Not to Sue and the agreement to indemnify Exxon, raise genuine issues of material fact or demonstrate that CDE is not entitled to coverage under the Exxon Policies as a matter of law.

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[4] In accordance with Section 4.3 of the Settlement Agreement dated June 30, 2000, Exxon hereby states that Holland & Knight is acting on behalf of Exxon, as indemnitor of the London Market Insurers, and, therefore, the positions taken are not necessarily those of the London Market Insurers.

ARGUMENT

POINT I

CDE FAILED TO PROPERLY PLEAD OR GIVE APPROPRIATE NOTICE OF ANY CLAIM UNDER THE EXXON POLICIES

CDE failed to properly plead any coverage it now claims under the Exxon Policies. To move for summary judgment, a party must have served a pleading seeking that relief at least 35 days before so moving. "A party seeking any affirmative relief may, at any time after the expiration of 35 days from the service of the pleading claiming such relief, move for a summary judgment or order on all or any part thereof." R. 4:46-1 (2010). Exactly a year ago, when asked if CDE would amend its Crossclaims to add the 1980-1983 Exxon Policies, CDE's counsel stated CDE would move "to assert its right to the additional coverage in the NJ case." Maniatis Cert., ¶ 13, Exh. 21. CDE has put the cart before the horse because CDE seeks a summary judgment on claims against the Exxon Policies it never asserted in its Crossclaims. As such, CDE's motion for summary judgment on these unasserted claims must be denied.

CDE's improper pleadings fail to provide adequate notice to the insurers on those policies of any such claim. In New Jersey, a pleading, including a crossclaim, "shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement." R. 4:5-2 (2010). As such, an adequate pleading or crossclaim "must fairly apprise the adverse party of the claims and issues to be raised at trial." *Spring Motors Distribs., Inc. v Ford Motor Co.*, 191 N.J. Super. 22, 29 (App. Div. 1983), *aff'd in part and rev'd in part on other grounds*, 98 N.J. 555 (1985). A crossclaim must therefore include more than conclusory allegations and reliance on subsequent discovery. *See Glass v. Suburban Restoration Co.*, 317 N.J. Super. 574, 582 (App. Div. 1998). In short, CDE's crossclaim must provide adequate notice of its claim against the

Exxon Policies with respect to which policy is triggered and to the insurers subscribing to the triggered policies. CDE's crossclaim significantly falls short.

A. CDE Failed to Properly Identify the Exxon Policies.

In its crossclaim, CDE failed to identify the Exxon Policies under which CDE now claims it has environmental coverage. It is well-settled under New Jersey law that to plead a claim for breach of contract, including an insurance policy, the plaintiff or CDE, in this case, must establish: (a) a contract, (b) breach of contract, (c) damages flowing therefrom, and (d) that the party claiming breach performed its own contractual duties. *See MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F. Supp. 2d 729, 735 (D.N.J. 2008) (applying New Jersey law). To prove the existence of a contract, CDE must set forth the elements of offer, acceptance, and consideration. *See Gardiner v. V.I. Water & Power Auth.*, 145 F.3d 635, 644 (3d Cir. 1998). "As every first-year law student knows, an offer and its acceptance are required to form a contract." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 250 (3d Cir. 2007).

CDE has not met its burden of stating an affirmative claim for coverage against the Exxon Policies. There is no question, given the facts and the allegations in CDE's Crossclaims, that CDE only claimed affirmative relief on the 11 policies on which it noticed the London Market Insurers – the FPE/CDE London Insurance, not the Exxon Policies. *See, supra,* pp. 5-8. There is certainly nothing in the Complaint in this action that "fairly apprise[s] the adverse party of the claims and issues to be raised at trial" with respect to the Exxon Policies. *Spring Motors Distribs.*, 191 N.J. Super. at 29.

CDE's crossclaims are indeed devoid of any reference to the particular Exxon Policies under which it now seeks coverage. Without a proper identification of the Exxon Policies, the London Market Insurers (and its indemnitor) lack sufficient notice of the claims against them.

The London Market Insurers rightfully read the Complaint to refer to the FPE/CDE London Insurance - the 11 policies CDE noticed and that are referenced in the London Market Insurers' Answer to CDE's Crossclaims. *See* Maniatis Cert., ¶ 9. And CDE's admission that it did not even know of the Exxon Policies until 2008, demonstrates that not even CDE intended for its Crossclaims in this action to include claims under the then-unknown Exxon Policies. CDE's Crossclaims do not provide notice of any claims for coverage under the Exxon Policies and do not seek affirmative relief against these policies. As such, this motion must be denied because CDE has failed to satisfy the procedural prerequisite to a motion for summary judgment, namely, a pleading served at least 35 days ago that seeks the affirmative relief sought hereon.

Rather than properly amend its crossclaims, CDE attempts to circumvent the pleadings process to assert an additional claim for coverage under the Exxon Policies against the London Market Insurers and to short-circuit appropriate due process by moving immediately for summary judgment, apparently, in lieu of complaint. CDE's failure to comply with the pleadings requirements has resulted in this premature motion for summary judgment, causing Exxon and the London Market Insurers to incur unnecessary expenses related thereto. CDE's motion should be denied in its entirety.

POINT II

EVEN ASSUMING CDE HAS STATED A CLAIM IN ITS CROSSCLAIM AGAINST THE EXXON POLICIES, SUCH CLAIM MUST BE ARBITRATED

Exxon respectfully refers the Court to its contemporaneously filed Motion to Stay in Favor of Arbitration and to Compel Arbitration. It is sufficient to note, here, that any claims for coverage, if properly stated, must be brought in arbitration pursuant to the mandatory arbitration provisions in the Exxon Policies.

POINT III

EVEN ASSUMING CDE HAS A NON-ARBITRABLE CLAIM UNDER THE EXXON POLICIES, WHICH EXXON DENIES, MATERIAL ISSUES OF FACT EXIST AND ADDITIONAL DISCOVERY IS NECESSARY TO DETERMINE COVERAGE UNDER THE POLICIES

In Point II of its Motion, CDE contends that neither Exxon nor the London Market Insurers "have provided any legitimate basis for disputing that the Exxon Policies provide coverage to CDE." CDE Memo at 10. Of course, CDE conveniently overlooks the fact that it has failed to plead a claim for coverage under the Exxon Policies. As such, neither Exxon nor the London Market Insurers have been given the opportunity under the rules to submit an answer with defenses related to the claim for coverage under the Exxon Policies. *See* R. 4:5-1(a) (2010) (defining proper pleading). Moreover, there are different insurers on the Exxon Policies than those that are on the 11 prior year policies.

CDE argues that the London Market Insurers' participation in a trial and summary judgment motion on the FPE/CDE London Insurance somehow entitles CDE to coverage under the wholly different and later Exxon Polices. *See* CDE Memo at 8-10. CDE ignores, however, the differences between the FPE/CDE London Insurance policies and the Exxon Policies. Thus, the Exxon Policies were issued starting in July 1980, a time when CDE has already conceded it knew enough about PCBs that any coverage would likely be barred by the known loss doctrine. *See, supra*, pp. 16-18. Because CDE has not brought claims related to the 1980-83 period previously, discovery is necessary to determine what CDE knew and what steps it took in this time period. The evidence so far accumulated by Exxon suggests strongly that CDE was aware of the environmental claims and, therefore, either is barred from cover by the known loss doctrine or a failure to disclose its potential liabilities. These issues may also impact the Pollution Exclusion in the Exxon Policies. Another material difference is the fact that the

FPE/CDE London Insurance policies, unlike the Exxon Policies, do not include a sue and labor provision. *See* Maniatis Cert., Exhs. 7-17; Wilson Cert., Exh. A, Art. VIII(13); *see e.g.,* Sanoff Cert., Exh. G. Indeed, in their Answer to CDE's Crossclaims, the London Market Insurers do not assert a defense of sue and labor. *See* Maniatis Cert., Exh. 2.

On the other hand, Exxon, as indemnitor of the Insurers, has a right to a sue and labor defense pursuant to the terms of the Exxon Policies. Where an insured fails to comply with a sue and labor provision, coverage is barred. *See, e.g., Intermondale Trading Co. v. North River Ins. Co. of New York.* 100 F. Supp. 128, 132 (S.D.N.Y. 1951) (barring insurance coverage where insured breached sue and labor provision of policy); *Teheria El Popo v. Home Ins. Co.*, 136 N.Y.S.2d 574, 579-80 (Sup. Ct., New York County, 1954) (finding insured not entitled to coverage where violated sue and labor provision by failing to preserve or safeguard covered risk); *see also Am. Nat'l Fire Ins. Co. v. Mirasco, Inc.*, 249 F. Supp. 2d 303, 327 (S.D.N.Y. 2003) (explaining that recovery is unavailable where insured's losses occurred as result of sue and labor clause); *GTE Corp. v. Allendale Mut. Ins. Co.*, 258 F. Supp. 2d 364, 373 (D.N.J. 2003) (noting sue and labor provisions traditionally included to encourage insured to take measures to preserve subject matter of policy) (citation omitted).

To better assess Exxon's rights as indemnitor under the Exxon Policies, however, further discovery is necessary, especially where the London Market Insurers did not or could not raise defenses on the Exxon Policies because of the lack of notice in the Crossclaim. Where discovery on material issues is not complete, the respondent must therefore be given the opportunity to take discovery before disposition of the motion. *See* R. 4:46-2; *see, e.g., Lenches-Marrero v. Averna & Gardner.*, 326 N.J. Super. 382, 387-88 (App. Div. 1999) (adjourning motion for

summary judgment to give non-moving party an opportunity for discovery on matters first disclosed in recent deposition).

This is true, not only with respect to Exxon's defense of sue and labor, but also with other defenses, including, but not limited to: (1) CDE is not a named or additional insured under the policies; (2) the Exxon Policies have been commuted by Endorsement No. 28 or by the Settlement Agreement; (3) the known loss doctrine bars CDE's claims; and (4) the covenant not to sue under the 1983 Stock Purchase Agreement bars CDE's claims. Similarly, other defenses, such as failure to state a claim, non-justiciable controversy, non-occurrence, misrepresentation, late notice, owned/leased property, intentional conduct, no damages, pollution exclusion, no duty to defend, laches, failure to cooperate, failure to mitigate, contractually assumed liability, and the entire controversy doctrine may bar CDE's claims.

In addition, Exxon has a claim against CDE under its indemnity that was provided in the 1983 Stock Purchase Agreement. CDE's motion for summary judgment on the Exxon Policies is therefore premature because Exxon's coverage defenses (not including potential defenses not raised or discussed herein), other defenses, and its counterclaims present genuine issues of material fact warranting a denial of CDE's motion and requiring discovery.

A. CDE is not an Insured on the Exxon Policies.

CDE distorts the language of the Named Insured clause and ignores the background of this unusual insurance that provided, as needed, direct insurance and reinsurance. *See* Wilson Cert., ¶ 4; Chasser Cert., ¶¶ 7-8. CDE also ignores the language of the addenda that reference Reliance and does not explain why such addenda would be issued if the Named Insured clause has the meaning espoused by its counsel. As shown in the Certifications of Peter Wilson, one of the leading underwriters on the Exxon Policies at the relevant time, and Thomas Chasser, the parties to the Exxon Policies had a course of dealing that demonstrates an interpretation of these

policies that gives effect to all of their provisions, eliminates the internal inconsistency inherent in the CDE-after-the-fact-and-uninformed-proposed interpretation, and comports with the parties' actual intent.

The intent of the parties to an insurance contract, which includes a view of the surrounding circumstances regardless of ambiguity, governs the interpretation of that contract. CDE made the same argument in its *Carter-Wallace* Summary Judgment Motion. *See* Toriello Cert., Exhs. 8-9. In fact, CDE argued that "in any interpretation of a contract you'd start by understanding the circumstances." *Id.*, Exh. 9 at 7:12-13. Aside from the factual differences (there, the interpretation of Endorsement No. 19), Exxon could literally copy and paste CDE's argument to show the parties to the Exxon Policies – Exxon and Ancon as the insureds and, of course, the London Market Insurers – never intended to provide direct cover to CDE under those policies. For CDE to now flip the script and ignore the parties' intent is not only incorrect, it is disingenuous.

More importantly, New Jersey law supports the argument that the Exxon Policies should be read together and in context, considering how the parties themselves interpreted them, when determining coverage for CDE. The court must consider "all of the relevant evidence that will assist in determining the intent and meaning of the contract," including evidence extrinsic to the policy itself. *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 269 (2006). As explained by the New Jersey Supreme Court:

> [e]vidence of the circumstances is always admissible in aid of the interpretation of an integrated agreement. This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. . . . The judicial interpretive

> function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.

Id. at 269 (quoting *Atl. N. Airlines v. Schwimmer*, 12 N.J. 293, 301-02 (1953)). Such a thorough examination of extrinsic evidence "may include consideration of the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." *Id.* (quoting *Kearny PBA Local #21 v. Town of Kearny*, 81 N.J. 208, 221 (1979)). "Semantics cannot be allowed to twist and distort [the words'] obvious meaning in the minds of the parties." *Id.* at 269-70 (quoting *Schwimmer*, 12 N.J. at 307)).

The totality of the circumstances concerning Exxon, Ancon, and the London Market Insurers demonstrate that CDE was not a direct insured under the Exxon Policies:

- Under the Exxon/Ancon comprehensive insurance program, Ancon provided insurance coverage to Exxon's affiliates. *See* Chasser Cert., ¶¶ 3, 6; *see also* Wilson Cert., ¶ 4.

- Reliance managed CDE's insurance coverage and did not purchase coverage for CDE through the Exxon/Ancon program until July 1, 1980, after Reliance's pre-acquisition policies had expired. *See* Stolle Cert., ¶¶ 4, 6, 9. As such, CDE could not have been insured under the Exxon Policies when it became affiliated with Exxon in 1979, as CDE contends.

- Reliance was fully aware Ancon provided coverage for Reliance and its affiliates under the Ancon Policy, not the Exxon Policies. *See* Stolle Cert., ¶¶ 10-11. Each year that CDE remained affiliated with Exxon, Reliance renewed the Ancon policy, paid the premiums on that policy, and charged CDE its proportionate share. *See id.*

- Exxon and Ancon, as the named insureds, had maximum flexibility to determine how CDE would be covered through the Exxon/Ancon insurance program. *See* Chasser Cert., ¶¶ 7-8; Wilson Cert., ¶¶ 4-5. Where Ancon issued a policy to Exxon or one of its affiliates, the Exxon/Ancon program acted only as reinsurance of Ancon. *See* Chasser Cert., ¶¶ 7-8; Wilson Cert., ¶ 4. Neither the London Market Insurers, Exxon, nor Ancon intended the program to effect double insurance for any affiliate by providing direct insurance under the Exxon policies

and reinsuring the same affiliate under an Ancon policy, as CDE suggests. *See* Chasser Cert., ¶ 9; Wilson Cert., ¶ 6.

- The insurance broker identified Reliance (or any affiliate) as additional insureds on addenda to the Exxon Policies merely as a way to document its participation in the Exxon/Ancon insurance program, and to permit Exxon flexibility in issuing an Ancon policy or allowing the affiliate to receive direct insurance under the Exxon Policies. *See* Wilson Cert., ¶ 9; Chasser Cert., 14.

- The broker's files in this case include a specific note apparently initialed by the underwriters to the 1980 Exxon Policy expressly providing: "It is noted and agreed that RELIANCE ELECTRIC COMPANY is not included effective inception but will be included effective from [1st July 1980]." *See* Toriello Cert., Exh. 7.

- In addition to the 1980 policies, the 1981 Exxon Policies also identify Reliance as an additional insured, but not FPE or CDE. *See* Sanoff Cert., Exh. G12-29, Add. No. 20. Rather, Reliance's affiliates are only identified as additional insureds on the 1982 and 1983 Exxon Policies. *See id.*, Exh. G-30-40. This is inconsistent with CDE's current position that it was automatically insured on the Exxon Policies in 1979.

- The Ancon Policy excludes coverage for PCB liabilities at the New Bedford site. *See* Stolle Cert., ¶ 9, Exh. A, End. No. 4. The Exxon Policies contain no such exclusion. Presumably, the London Market Insurers (the same insurers subscribing to the Ancon Policy) would not have provided direct coverage under those policies without that exclusion. Reliance surely would have pursued that coverage on CDE's behalf if it was available. It was not. CDE's interpretation makes the exclusion in the Ancon policy superfluous and meaningless.

- Neither CDE nor Reliance (on CDE's behalf) ever paid for any insurance under the Exxon Policies. *See* Stolle Cert., ¶ 11.

- While Reliance knew the Exxon Policies existed, it never considered they provided coverage for it or its affiliates, including CDE, and never relied on such coverage. *See* Stolle Cert., ¶ 11.

- CDE admits it never knew the Exxon Policies existed and, thus, never relied on that coverage.

Taken as a whole, the Exxon Policies were never intended to provide direct cover to CDE as either a named or additional insured. CDE was indeed a stranger to those policies. To show that it fits the definition of "Affiliated Companies" and, therefore, is so named, CDE itself must resort to parol evidence outside the four corners of the insurance contract. At the very least, this

raises genuine issues of material fact as to whether CDE is, in fact, entitled to direct coverage under the Exxon Policies. CDE has not satisfied the summary judgment standard and, thus, its Motion must be denied.

B. The Exxon Policies Have Been Commuted.

1. Exxon and the London Market Insurers Agreed to Commute Coverage Under the Exxon Policies for Environmental Claims.

Even assuming, *arguendo*, CDE was an insured by virtue of having been a third-party beneficiary of the Exxon Policies,[5] such status ceased when Exxon, Ancon, and certain of the London Market Insurers commuted all coverage for environmental liabilities under these and other policies. See Heckman Cert., ¶¶ 5-6. Specifically, on or about June 30, 2000, as part of a global coverage settlement, Exxon and the London Market Insurers executed a Settlement Agreement and Release. The agreement provided, *inter alia,* for the mutual release of all claims for coverage involving environmental liabilities under certain insurance policies, including particularly the Exxon Policies. Notwithstanding this commutation, CDE (as an indirect subsidiary of Exxon) nonetheless claims it is afforded direct insurance under the Exxon Policies.

CDE argues that the signatories to the Settlement Agreement (Exxon and Ancon, as insureds, and certain of the London Market Insurers, as insurers) could not release CDE's claims under the Exxon Policies because: (1) CDE was not a party to the release and was not informed of the settlement until nine years later; (2) the Settlement Agreement could not cancel coverage for occurrences that took place prior to the date of the settlement agreement; and (3) it would be

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[5] *See, e.g., Carvalho v. Toll Bros. & Developers*, 278 N.J. Super. 451, 466 (App. Div. 1995) (finding engineer, as additional insured, was a third-party beneficiary under general liability policy); *see also State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 560 (1st Dist. 2009) (concluding Quality was an intended third-party beneficiary under insurance policy, where insured Rickhoff took out additional insured coverage for Quality); *Merced County Mut. Fire Ins. Co. v. State of California*, 233 Cal. App. 3d 765, 775 (5th Dist. 1991) (finding an additional insured added by endorsement is a third-party beneficiary of the insurance contract between promisor and promisee).

unfair. CDE's arguments all fail to support, legally or equitably, a claim for coverage under the Exxon Policies.

As shown above, the Exxon Policies – even if not commuted – do not provide direct insurance coverage to CDE, as CDE's coverage was limited to policies issued by Ancon. Were this Court to find to the contrary, CDE's claim for coverage could only be that of a third-party beneficiary because it concededly did not negotiate the coverage, pay the premium, or even know of the insurance at the relevant time. There is nothing in the policies or in law that prevents the actual parties to the insurance, namely, Exxon, Ancon, and the subscribing insurers, from controlling the contract of insurance, effecting changes, or even commuting coverage without seeking the consent of every third-party beneficiary.

Indeed, a contrary rule would be entirely unworkable in practice because many policies provide cover to numerous third-party beneficiaries, such as officers, directors, affiliates, and subsidiaries. A requirement that each of these beneficiaries consent to every change in coverage would make amendments and changes to policies impossible and interfere with the overall business of insurance. Such a rule is clearly rejected by the Restatement (Second) of Contracts ("Restatement") §311, "Variation of a Duty to a Beneficiary."[6] Restatement § 311(2) explains that, in the absence of a contractual provision to the contrary, "the promisor [here, the subscribing insurers] and promissee [here, Exxon and Ancon] retain power to discharge or modify the duty [to an intended beneficiary] by subsequent agreement."

In recognition of this rule, it is commonplace for banks added as additional insureds on an insurance policy as part of a financing to insist that the additional insured clause also include

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[6] New Jersey gives substantial weight to the Restatement view, particularly in respect of issues it has not yet addressed. *See H. John Homan Co. v. Wilkes-Barre Iron & Wire Works, Inc.*, 233 N.J. Super. 91, 97 (App. Div. 1989).

a requirement of advance notice of any change in coverage that may be affected by the insured, insurer, or both of them. *See, e.g., Chem. Bank v. Affiliated FM Ins. Co.*, 169 F.3d 121, 124 (2d Cir. 1999), *rev'd on other grounds*, 196 F.3d 373 (2d Cir. 1999), *rev'd on other grounds, Chase Manhattan Bank* v. *Affiliated FM Ins. Co.*, 343 F.3d 1020 (2d Cir. 2003) (noting banker's endorsements required 10 days prior notice of any change in coverage). Of course, in the insurance at issue here, there is no requirement that the affiliates of Exxon or Ancon receive prior notice of any change in coverage. Indeed, the Notice of Claim clause in the policies confirms the recognition that Exxon is the party that controls the insurance. The time to give notice of claim begins to run only when the Exxon insurance services department learns of the claim, not when any of the affiliates might learn of a claim. *See, e.g.,* Wilson Cert., Exh. A, Art. VIII(2).

In short, there was no provision in the Exxon Policies that prevented Exxon and the London Market Insurers from discharging or modifying any duty owed to CDE, and none has been cited by CDE. The decision to commute the policies was simply not prohibited by the policies themselves, which are silent on who has power to bind the insureds. Thus, it is irrelevant that CDE "was not a party to the release, did not consent to the release, did not share in the settlement proceeds, and was not informed of the settlement until nine years later." CDE Memo at 11. CDE's strained interpretation of the law would require every "Insured" - all current and former affiliates, current and former employees, shareholders, etc. - to agree to commutation, which would be impossible. Importantly, such agreement is not required. In the absence of an express contractual term to the contrary, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement, and by execution of the Settlement Agreement. That is what Exxon and the London Market Insurers did – they discharged the

duties of the London Market Insurers in 2000 to provide coverage for claims such as this under the Exxon Policies.

Moreover, based upon course of performance, Exxon and Ancon had the exclusive power to amend the London Market Insurers' policies because these were the parties that negotiated the contracts every year. CDE and its parent, Reliance, concededly had no contact with the Exxon Policies and CDE, of course, did not even know of them. CDE's citation to "black letter law" regarding "cancellation" of rights to insurance for occurrences that have already happened are beside the point. *See* CDE Memo at 11-12.[7] There is no unilateral act of cancellation here. Nor is there a policy provision that prevented Exxon and the London Market Insurers from discharging or modifying any duty owed to CDE as a third party beneficiary.

The circumstances under which a contract may no longer be modified, or a duty discharged, without the consent of an intended beneficiary are also spelled out in the Restatement. Specifically, Restatement § 311(3) lists three vesting events that signal when a contract may no longer be modified without the consent of an intended beneficiary:

> [W]hen the beneficiary before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

Accord James v. Zurich-American Ins. Co. of Illinois, 203 F.3d 250, 257 (3d Cir. 2000) (denying coverage to intended third-party beneficiary, finding no potential third-party rights had ever vested under the Restatement § 311(3) test).

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[7] CDE's argument that the "mutual rescission" or cancellation of the Exxon Policies does not abrogate CDE's rights, with citations to *Couch on Insurance* 3d vol. 2 § 31.49 and cases dealing with cancellation of policies after an occurrence, fails to consider that any right CDE may have had to coverage as an additional insured had not vested. Under the Restatement's test, and under the facts and terms of the Exxon Policies, Exxon and the London Insurers were free to commute the Exxon Policies without the consent of CDE, as no potential third-party rights ever vested in CDE at the time of commutation.

The record here establishes without contradiction that CDE did not materially change its position in reliance on the Exxon Policies prior to the 2000 Settlement Agreement and Release. In fact, it was never even aware of any possible coverage under the Exxon Policies until 2008, long after Exxon and the relevant London Market Insurers had commuted the policies. Second, CDE did not commence suit before 2000 and indeed has yet to commence suit under the Exxon policies. *See* Toriello Cert., Exh. 6; Bates Cert., Exh. 1. CDE also knew Exxon, the actual named insured through whom CDE seeks to claim, has consistently denied any such coverage exists, and that any disputes as to coverage must be submitted to arbitration. Further, CDE has yet to identify, name, and join all of the insurers under the Exxon Policies in this action. Finally, and assuming the Exxon Policies provide coverage (which is disputed), it is undisputed that Exxon and the London Market Insurers did not request, prior to the 2000 Settlement Agreement and Release, CDE's assent to any promise that it would be covered under the Exxon Policies, a promise that (a) was never made and (b) was never conveyed to CDE at all.[8]

CDE lastly argues that, because it sent a document request asking Lloyd's to produce all policies that provided CDE with insurance coverage prior to June 2000, it would be "unfair" to uphold the commutation of the Exxon Policies. *See* CDE Memo at 12. With this argument, CDE seeks to do indirectly what this Court has already refused to do – find liability under the Exxon Policies as a result of alleged discovery violations. *See* Maniatis Cert., Exh. 22.

To further support its "unfairness" argument, CDE contends equitable estoppel applies to prevent the assertion of a coverage defense based upon the June 30, 2000 Settlement Agreement.

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[8] In any event, if the discharge of the London Market Insurers is ineffective as against CDE, then at most CDE may assert a claim against the consideration Exxon received as part of the settlement and release with the London Market Insurers. *See* Restatement § 311(4). This would mean that CDE would need to claim directly against Exxon, something it has not done nor can do because such a claim would violate the covenant not to sue under the 1983 Stock Purchase Agreement. *See, supra*, pp. 19-20.

CDE cannot possibly make a claim for equitable estoppel, as even CDE concedes that for equitable estoppel to apply, there must be proof CDE acted or changed its position to its detriment based on some act or conduct of the London Market Insurers or Exxon.[9] As shown above, CDE was not even aware of the Exxon Policies, or any purported coverage under those policies. Nor does CDE prove or even allege it acted in any way to its detriment.

As to what is "fair," a salient fact is that, at all relevant times, CDE made a deliberate decision not to commence suit on the Ancon coverage (although it had given notice of a potential claim) apparently because of the known loss issues. Thus, there was no need for Ancon to preserve its reinsurance for this claim and the parties to the Exxon Policies never believed any coverage was provided to CDE directly under these policies. *See* Toriello Cert., Exh. 8 at 6-10. At the time of the Exxon/Ancon insurance settlement in June 2000, Ancon had no notice of any reinsurance or other claim being asserted by CDE. Nor had Exxon given any notice of a direct claim under the Exxon Policies for any CDE losses. If anyone is prejudiced by CDE's instant request for summary disposition on an unasserted claim for coverage under the Exxon Policies, it is Exxon, which is now facing a 30 year-old claim after commuting the environmental claims coverage in the Exxon policy more than ten years ago.

2. Addendum No. 28 to the Exxon Policies Retroactively Commuted Cover for CDE's Environmental Claims.

To the extent CDE has any environmental claims under the Exxon Policies, which Exxon denies, Addendum No. 28 retroactively commuted those claims. *See* Chasser Cert., ¶¶ 15-16, Exh. 1. CDE is no stranger to this argument. In fact, CDE made the same argument in its *Carter-Wallace* Summary Judgment Motion by relying on the language of Endorsement No. 19 to the Ancon policy – language also found in Addendum No. 28 of the Exxon Policies. At the

[9] CDE cites to *Knorr v. Smeal*, 178 N.J. 169 (2003), which clearly requires a showing of reliance on the part of the plaintiff and that the plaintiff acted or changed its position to its detriment.

hearing on that motion, CDE argued that Endorsement No. 19 effectively changed the coverage from an occurrence-based to a claims-made policy at inception, thereby retroactively wiping out any coverage for events and claims that occurred or were made prior to the July 1, 1980 inception date. *See* Toriello Cert., Exh. 9 at 32:12-15.

Given that Addendum No. 28 contains very similar language, it too retroactively commuted the Exxon Policies back to the date of inception – July 1, 1980. As such, Addendum No. 28 wipes out any coverage CDE claims to have under those policies. More importantly, CDE admits it knew of the environmental losses or occurrences for which it now claims coverage under the Exxon Policies. *See* Toriello Cert., Exh. 8 at 6. Indeed, it is because of such knowledge that CDE decided not to pursue coverage under the Ancon Policies – policies covering the same time period as the Exxon Policies. CDE's motion for summary judgment must be denied.

C. <u>The Exxon Policies Do Not Cover CDE Under the Known Loss Doctrine</u>.

CDE's knowledge of the losses related to its use of PCBs prior to the inception of the Exxon Policies bars any claim CDE thinks it has under those policies. In *Astro Pak Corp. v. Fireman's Fund Ins. Co.*, 284 N.J. Super. 491 (App. Div. 1995), the court reasoned:

> If the prevention of fraud is at the heart of these rules, the "loss" must relate to a known occurrence that would trigger indemnification by the insurer. Only if plaintiff knew that its acts had already subjected it to potential liability because of leakage into the surrounding land, water or air, would the insurers have a claim of defense. Insurance companies "do not cover economic detriment that is not fortuitous from the point of view . . . of the insurer's liability."

Id. at 498-99 (citation omitted). *See, e.g., Twp. of Gloucester v. Maryland Cas. Co.*, 668 F. Supp. 394, 403 (D.N.J. 1987) (denying motion for summary judgment where insured already knew risk had transpired at policy inception) (applying New Jersey law); *Creighton v.*

Petroleum Marketers Mut. Ins. Co., No. L-89-0882, slip op. at 4-5 (N.J. Super. Dec. 7, 1989), *reported in* Mealey's Litig. Rep-Ins., Jan. 30, 1990 (finding insurer non-liable for cleanup costs where insured knew four days before inception of policy that property was contaminated); *Morton Thiokol, Inc. v. Gen. Accident Ins. Co. of Am.*, No. C-3956-85, slip op., at *16-18 (N.J. Super., Bergen County, Aug. 27, 1987) (barring coverage because any insurance acquired subsequent to the risk, harm, and notice thereof, is not valid as to those risks and that harm).

At the inception of the Exxon Policies, CDE knew very well that its use of PCBs had contaminated various sites and resulted in the losses at those sites. CDE has admitted this in its papers previously submitted to this Court in this matter. In 2005, in opposition to Allstate's motion to join Ancon in this action, CDE stated "the Ancon policies cover periods of time when environmental risks from PCB releases were beginning to be understood sufficiently to raise the likelihood that those risks were not covered because of the 'known loss' doctrine." Toriello Cert., Exh. 11 at 10. As such, CDE argued that the "Ancon policies do not appear to provide coverage for the environmental claims because of the known loss doctrine." *Id.* at 11.

The Exxon Policies cover the same period as the Ancon policy. The Exxon Policies and the Ancon policy also share the same inception date of July 1, 1980. It therefore follows that any known loss precluding CDE's environmental claims under the Ancon policy, which CDE admits, also precludes any coverage CDE now alleges under the Exxon Policies. At a minimum, Exxon, as indemnitor of the London Market Insurers, is entitled to discovery of this issue before a coverage determination is made on the Exxon Policies. CDE's Motion must be denied in its entirety because Exxon's known loss defense raises a genuine issue of material fact sufficient enough to defeat summary judgment.

POINT IV

EVEN ASSUMING CDE HAS A NON-ARBITRABLE CLAIM UNDER THE EXXON POLICIES, WHICH EXXON DENIES, CDE AGREED TO INDEMNIFY AND NOT SUE EXXON FOR ANY SUCH CLAIM

When CDE was sold in 1983, it ceased to be entitled to coverage through the Exxon/Ancon insurance program. It contractually severed its ties to Exxon and Ancon. As part of that contract, CDE agreed not to sue Exxon or Ancon either directly or indirectly for any claims specified in that contract, including the environmental claims for which CDE now seeks coverage under the Exxon Policies. *See* Heckman Cert., Exh. 1, § 3.3(a), CDE also agreed to indemnify Exxon and Ancon if any such claim is made. *See* id., § 5.5.

To date, CDE's actions have been consistent with this understanding and commitment. CDE never made a claim against Ancon or the Ancon Policy. Nor has CDE sued Exxon. But as indemnitor of the London Market Insurers with respect to the Exxon Policies, CDE's motion for summary judgment as to those policies effectively makes an indirect claim against Exxon. Even assuming, *arguendo*, CDE had a valid claim under the Exxon Policies, this motion still is improper and should be denied. Indeed, CDE would have to pay its own reward for the environmental claims because CDE agreed to indemnify and protect Exxon from these very circumstances.

CONCLUSION

Pursuant to R. 4:46-1, CDE has not made the requisite claim for relief against the Exxon Policies to bring this motion for summary judgment. When noticing the London Market Insurers for claims concerning the New Jersey sites, CDE did not clearly apprise the defendants of claims under the Exxon Policies. For that reason alone, this Motion is premature and should be denied.

Nonetheless, even if CDE had a claim against the Exxon Policies, this court is not the proper forum to address those claims. The Exxon Policies themselves require that any such

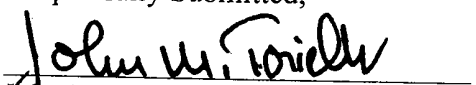
claim be arbitrated. And even if litigation were appropriate, Exxon and the London Market Insurers agreed upon New York as the chosen forum with respect to any claim concerning the Exxon Policies.

Should there be no right to arbitration, the summary judgment claims must be denied as there are numerous material issues of fact regarding defenses to those claims. Moreover, discovery has not yet been completed in the relevant 1980 to 1983 period, and discovery is necessary to develop the evidence necessary to contest this motion.

For the reasons set forth above and accompanying papers in support hereof, Exxon respectfully requests this Court deny CDE's motion for summary judgment on the Exxon Policies in its entirety, together with such other relief as this Court deems proper.

Dated: New York, New York
July 29, 2010

Respectfully Submitted,



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